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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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In the Matter of )  
 )  
Amendment of the Commission's Rules )  
To Permit Flexible Service Offerings )  
in the Commercial Mobile Radio Services )

WT Docket No. 96-6

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**COMMENTS OF  
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

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The Personal Communications Industry Association ("PCIA"),<sup>1</sup> by its attorneys, respectfully submits its comments regarding the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>2</sup> The *Notice* generally seeks comment on whether commercial mobile radio service ("CMRS") providers should be permitted to offer expanded service options, what these options should be, and how they should be regulated. As described in more detail below, PCIA believes that wireless carriers should be permitted to provide all technically feasible fixed services, and that the Commission should regulate such fixed CMRS offerings under the same structure as mobile CMRS services.

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<sup>1</sup> PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

<sup>2</sup> FCC 96-17 (Jan. 25, 1996) ("*Notice*"). The date for filing opening comments was extended to March 1, 1996. *Order*, DA 96-225 (Feb. 22, 1996).

## I. INTRODUCTION AND SUMMARY

The *Notice* proposes to grant all broadband CMRS providers the regulatory flexibility to offer fixed wireless local loop service.<sup>3</sup> It also solicits comment on whether CMRS providers should be permitted to offer other fixed services,<sup>4</sup> and whether such expanded service offerings should be limited to broadband CMRS licensees, or should include all CMRS licensees.<sup>5</sup> Further, the Commission seeks comment on how spectrum use by wireless carriers offering fixed services should be regulated.<sup>6</sup> In addition, the Commission proposes to continue to apply CMRS regulation to wireless carriers that offer both interconnected, for-profit mobile services and fixed wireless local loop services.<sup>7</sup> Finally, comment is solicited on how fixed wireless services should interface with the Commission's universal service regimen.<sup>8</sup>

PCIA strongly endorses the Commission's proposals for clarifying or increasing the extent of operational flexibility accorded CMRS providers under the Commission's Rules. This pro-competitive and de-regulatory program should permit not only the offering of fixed wireless local loop services by PCS providers, but should be expanded

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<sup>3</sup> *Notice*, ¶ 1.

<sup>4</sup> *Id.*, ¶ 22.

<sup>5</sup> *Id.*, ¶ 18.

<sup>6</sup> *Id.*, ¶ 23.

<sup>7</sup> *Id.*, ¶ 20.

<sup>8</sup> *Id.*, ¶ 21.

to allow broadband and narrowband CMRS providers to offer all fixed services that they are technically capable of providing. In addition, the Commission should rely on the marketplace to determine the use of CMRS spectrum for mobile or fixed services. By allowing CMRS providers the maximum possible degree of regulatory flexibility, the Commission will more successfully promote its goal of "increas[ing] competition within wireless services and promot[ing] competition between wireless and wireline services."<sup>9</sup>

Fixed CMRS offerings should be encompassed within the same regulatory structure as mobile CMRS. PCIA believes that the Commission has the jurisdiction to preempt any state regulation of wireless fixed services that impedes achieving federal policies for CMRS (including the development of a competitive marketplace) reflected in the Communications Act. This authority arises from both Section 332(c) of the Communications Act and the inseverability doctrine, as described in *Louisiana PSC* and its progeny. Finally, as PCIA has asserted in other pending proceedings, the universal service program should be adjusted to ensure that wireless carriers are provided with a non-discriminatory opportunity to compete for the opportunity to serve high cost customers.

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<sup>9</sup> *Id.*, ¶ 1.

## **II. ALL BROADBAND AND NARROWBAND CMRS LICENSEES SHOULD BE PERMITTED TO PROVIDE ALL FIXED SERVICES**

In the *Notice*, the Commission stated that its underlying goal in this proceeding is to "remov[e] barriers to competitive provision of local exchange service throughout the United States."<sup>10</sup> The Commission thus proposed to alter its spectrum allocations so that "broadband CMRS providers [are] able to offer the equivalent of local exchange service using existing allocations for PCS, cellular, and SMR."<sup>11</sup> In addition to altering its spectrum allotments, the Commission proposed "a flexible regulatory scheme" that would obviate the need for a rulemaking or waiver proceeding each time a CMRS provider "adjust[ed] its operational mode to respond to consumers' changing communications requirements."<sup>12</sup>

PCIA believes that the Commission should act expeditiously to implement rule changes to permit *all* broadband and narrowband CMRS licensees to provide *all* fixed services. Prompt action will best advance the Commission's stated policy goals of regulatory parity, increased competition in the telecommunications marketplace, and regulatory simplicity.

First, broad application of the flexible regulatory treatment proposed in this proceeding is consistent with the Commission's statutory mandate to subject all CMRS

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<sup>10</sup> *Id.*, ¶ 8.

<sup>11</sup> *Id.*, ¶ 9.

<sup>12</sup> *Id.*

licensees to similar regulatory treatment.<sup>13</sup> The Commission has previously determined that all CMRS is "substantially similar" because of existing inter-service competition or the potential for future inter-service competition.<sup>14</sup> While technical constraints may limit actual fixed offerings in some services, the Commission should not erect a regulatory bar as well. The Commission accordingly should authorize all CMRS licensees -- PCS, cellular, SMR, and narrowband -- to provide a full range of fixed and mobile wireless communications services.<sup>15</sup>

Second, maximizing the operational flexibility for all CMRS licensees will promote competition in both the wireless and the local exchange marketplaces. Consumers will have available to them a broader range of service offerings at competitive prices. Service providers will have the capability, subject only to technical constraints, to tailor service arrangements to meet the needs of telecommunications users. Consumers of both fixed and mobile services thus will benefit from a broad authorization for CMRS licensees to provide fixed service.

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<sup>13</sup> See 47 U.S.C. § 332(c)(1)(A).

<sup>14</sup> *Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988, 7996 (1994) (Third Report and Order).

<sup>15</sup> To forestall any uncertainty that might arise as a result of explicitly allowing fixed operations in 2 GHz PCS, the Commission should clarify that its action does not allow existing point-to-point microwave licensees in that band to continue operations. Point-to-point microwave licensees will be unaffected by this proceeding because they fall outside of the definition commercial mobile radio service providers.

Third, allowing providers to offer a complete range of fixed services including, but not limited to, local loop service will advance the Commission's goal of administrative simplicity. Initially, granting CMRS licensees the authority to provide all fixed services avoids the expenditure of both Commission and service provider resources on defining "wireless local loop" and interpreting that definition. Further, if "wireless local loop" service is permitted and other fixed services are not, the Commission can expect that licensees may engage in technical or legal contortions in order to fit their fixed service offerings into the definition of "wireless local loop." Encouraging such sophistry is inconsistent with the Commission's desire to minimize regulatory interference and instead rely on the marketplace to shape service offerings.

### **III. THE COMMISSION SHOULD ALLOW THE MARKETPLACE TO DETERMINE HOW CMRS SPECTRUM IS USED**

PCIA urges the Commission, consistent with the pro-competitive, de-regulatory policies underlying this rulemaking, to allow the marketplace to determine whether CMRS spectrum will be used for mobile or fixed use, or a combination thereof. Moreover, the growing demand for mobile and fixed services suggests the Commission should stand ready to allocate additional spectrum to accommodate this demand.

The Commission undertook this rulemaking in part to "foster competitive local exchange service."<sup>16</sup> One of the means by which CMRS providers will be able to

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<sup>16</sup> Notice, ¶ 9.



compete most vigorously with local exchange carriers is by meeting the demand for "one-stop shopping" -- that is, the provision of both fixed and mobile services by a single vendor/service provider. In order to provide CMRS carriers with the ability to meet the demand for such integrated service offerings, the Commission should allow CMRS providers, in response to customer demand, to choose whether to use their spectrum for fixed or mobile use.

Finally, given the Commission's increasing reliance on competitive bidding to award CMRS licenses, the Commission should ensure that these licensees have very opportunity to make the most efficient use of that spectrum. Efficiency may not be promoted by regulatory directives that artificially limit the amount of fixed service that a CMRS licensee may include in its menu of service offerings. Rather, licensees should have an unfettered opportunity to respond to marketplace demands, which in turn will drive efficient spectrum usage.

#### **IV. CMRS LICENSEE PROVISION OF FIXED SERVICES -- WHETHER LOCAL LOOP OR OTHERWISE -- SHOULD BE TREATED UNDER THE SAME REGULATORY SCHEME AS CMRS MOBILE SERVICES**

In the *Notice*, the Commission proposes to "treat fixed wireless local loop services as an integral part of the CMRS services offered by a CMRS provider, so long as the carrier otherwise offers interconnected, for-profit mobile services to the public . . . ." <sup>17</sup> Thus, the *Notice* contemplates that fixed wireless services offered by

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<sup>17</sup> *Id.*, ¶ 20.

a CMRS provider would be subject to the same federal-state jurisdictional lines as the mobile services offered by such a provider. Based on Section 332(c) of the Communications Act<sup>18</sup> and the inseverability doctrine as espoused in *Louisiana Public Service Commission v. FCC*,<sup>19</sup> PCIA agrees that the Commission has the authority to treat fixed wireless services in the same manner as mobile wireless services.

Section 332(c) states in pertinent part that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ." <sup>20</sup> Thus, fixed CMRS service should be governed by the same preemption of state regulation as now governs mobile CMRS offerings. While Section 332(c)(3)(A) of the Communications Act imposes no prohibition on state regulation of the "other terms and conditions" of commercial mobile services, that jurisdiction remains subject to the "inseverability" doctrine. Under that doctrine, where it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," the federal regulation must preempt state law.<sup>21</sup> More broadly stated,

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<sup>18</sup> 47 U.S.C. § 332(c).

<sup>19</sup> 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

<sup>20</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>21</sup> *Louisiana PSC*, 476 U.S. at 376 n.4 (citing *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977)).

where "compliance with both federal and state law is in effect physically impossible," federal law must prevail.<sup>22</sup>

In *Public Service Commission of Maryland v. FCC*,<sup>23</sup> the FCC was held to have the power to preempt state regulation of the rates local exchange companies ("LECs") charge for discontinuation of interstate *and* intrastate telephone service.<sup>24</sup> In upholding the FCC's jurisdiction, the D.C. Circuit held that federal preemption of a state regulation is appropriate if:

- (1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter can not be unbundled from regulation of the intrastate aspects.<sup>25</sup>

Federal preemption of state regulation of fixed wireless services meets all three prongs of this test. First, fixed wireless services have both intrastate and interstate aspects. As the Commission notes, PCS providers "intend to integrate mobile, wireless

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<sup>22</sup> *Louisiana PCS*, 476 U.S. at 368.

<sup>23</sup> 909 F.2d 1510 (D.C. Cir. 1990) ("*PSC of Maryland*").

<sup>24</sup> *Id.* at 1516.

<sup>25</sup> *Id.* at 1515 (internal quotations and citations omitted). See also *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (state regulations limiting the ability of private microwave network users to interconnect to the LEC of their choice preempted based on inseverability); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (state regulations denying independent vendors the opportunity to market their customer premises equipment along with Bell Operating Company Centrex services preempted based on inseverability); *People of the State of California v. FCC*, 1996 WL 35901 (9th Cir. 1996) (state regulations concerning per line blocking of caller ID services preempted based on inseverability).

fixed, wireline networks, and cable facilities into seamless packaged offerings that could *span several states*."<sup>26</sup> Further, it is already well established that many PCS<sup>27</sup> and wide-area SMR<sup>28</sup> providers will offer their services over multistate areas. Within the context of fixed wireless networks, this means that when a CMRS customer places a call from her home in state A, the call might well be received by a CMRS base station in state B, a scenario that clearly implicates interstate communications.

Under the second prong of this test, FCC preemption is necessary to protect the valid federal regulatory objective of a de-regulated wireless marketplace. Not only does the language of Section 332(c) explicitly prohibit state entry and rate regulation, but the "broad goal" of Section 332(c) is "to ensure that economic forces -- not disparate regulatory requirements -- shape the development of the CMRS marketplace."<sup>29</sup> In the *Notice*, the Commission further found that carriers could "add value" to their mobile service offerings by marketing a "menu" of services, including fixed wireless loop service.<sup>30</sup> Thus, states should not be permitted to thwart the

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<sup>26</sup> *Notice*, ¶ 19 (emphasis added).

<sup>27</sup> *Amendment of the Commission's Rules To Establish New Personal Communications Services*, 8 FCC Rcd 7700, 7733 (1993) (Second Report and Order) (service areas are based on Major Trading Areas and Basic Trading Areas).

<sup>28</sup> *Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of an SMR System in the 800 MHz Frequency Band*, FCC 95-501, ¶ 25 (Dec. 15, 1995) (service areas are based on the Department of Commerce's Economic Areas).

<sup>29</sup> *Notice*, ¶ 19.

<sup>30</sup> *Id.*, ¶ 20.

important and legitimate federal goal of a vigorously competitive CMRS marketplace by restricting or otherwise regulating the ability of CMRS providers to offer whatever services their customers need -- including fixed services.

Under the third prong of this test, the interstate and intrastate aspects of wireless fixed services are inseparable for a number of reasons. First, some of the calls fed into the wireless local loop will be intrastate, while others will be interstate. Second, as noted above, CMRS carriers will deploy different parts of their fixed wireless networks in different states. Finally, the radio equipment, cables, and switches used to provide interstate communications are inseparable from those used to provide intrastate communications. Because of the inseverability of the intra- and interstate communications at issue, the Commission is empowered to preempt state regulation of fixed wireless services.

**V. CMRS PROVIDERS SHOULD BE ELIGIBLE FOR UNIVERSAL SERVICE FUND SUBSIDIES ON A NON-DISCRIMINATORY BASIS**

Assuming that it does permit wireless carriers to provide fixed local loop service, the Commission asks to what extent its universal service programs should be modified to subsidize, or impose obligations on, wireless providers.<sup>31</sup> At the same time, the Commission prefers to address all of the universal service issues raised in this proceeding in the currently pending universal service and subscribership

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<sup>31</sup> *Id.*, ¶ 21.

proceedings.<sup>32</sup> PCIA agrees with the Commission that all universal service issues should be addressed in a comprehensive fashion, and points out that it has already participated in the universal service and subscribership proceedings.

In the universal service proceeding, PCIA requested that any plan ultimately implemented must be characterized by the following features: (1) it must encourage the deployment of the most cost-effective technology, whether wireless, wireline, or satellite; (2) members of the wireless industry must be represented on the newly constituted Joint Board; (3) wireless carriers that provide local exchange service must have the same ability to qualify for universal service subsidies as do wireline carriers; (4) universal service support funding should be levied in a competitively neutral manner upon carriers required to fund universal service;<sup>33</sup> and (5) the FCC should continue to reduce the barriers to entry in the local exchange market, and consider designating more than one carrier as an "essential carrier."

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<sup>32</sup> *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 10 FCC Rcd 12309 (1995); *Amendment of the Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network*, 10 FCC Rcd 13003 (1995).

<sup>33</sup> It should be stressed that not all CMRS licensees are potential providers of fixed local loop services in competition with local exchange carriers. For example, today, and in the foreseeable future, it is *not* anticipated that narrowband services will approximate real-time two-way voice services provided by local exchange carriers and some wireless broadband carriers. Therefore, it may be inappropriate to place the same type of universal service obligations on narrowband carriers that are placed on other carriers.

In the subscribership proceeding, PCIA noted that one of the most effective tools available to the Commission to increase subscribership is the continued promotion of broad-based competition among communications services, regardless of the underlying technology. Thus, PCIA concluded that a pro-competitive, technology-neutral subscribership policy would provide all Americans with a greater choice of services at affordable prices.

Because it is intended in part to increase competition for the provision of local exchange service, the instant proceeding is linked to the universal service and subscribership proceedings. Increased competition will lead to lower prices and increased subscribership to the public switched telephone network. Therefore, PCIA urges the Commission to press forward with its proposal to allow CMRS carriers to provide fixed wireless services.

## **VI. CONCLUSION**

PCIA strongly supports granting all CMRS licensees increased flexibility to provide fixed wireless services. By minimizing artificial regulatory constraints on permissible service offerings and maximizing reliance on the marketplace to drive the service decisions of CMRS licensees, the Commission will enable wireless carriers to use their spectrum in a cost-effective, competitive manner. As a result, the Commission's policies will promote competition in both the wireless and local

exchange markets. Such competition will benefit American consumers, workers and businesses.

Respectfully submitted,

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